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No. 83-1007

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1983

TIFFANY FINE ARTS, INC., et al.,
Petitioners,

VS.

UNITED STATES OF AMERICA, et al.,
Respondents.

On Writ of Certiorari To
The United States Court of Appeals
For The Second Circuit

BRIEF FOR FIRST WESTERN GOVERNMENT SECURITIES, INC. AND SAMUELS, KRAMER & COMPANY AS AMICI CURIAE

IN SUPPORT OF REVERSAL

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QUESTION PRESENTED

Can the I.R.S. deprive unidentified taxpayers, who are under I.R.S. investigation, and who are the subjects of an administrative summons, of the congressionally-mandated safeguards of 26 U.S.C. § 7609(f), simply by choosing to investigate also the summoned party who holds the taxpayers' records?

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FIRST WESTERN GOVERNMENT SECURITIES, INC.
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AS AMICI CURIAE

This Brief is submitted on behalf of First Western Government Securities, Inc. and Samuels, Kramer & Company with the consent of all parties. This Brief supports petitioners and urges reversal of the decision below.

INTEREST OF THE AMICI CURIAE

First Western Government Securities, Inc. and Samuels, Kramer & Co. (hereinafter jointly referred to as "First Western") are the appellants in two appeals pending before the United States Court of Appeals for the Ninth Circuit, *United States v. Samuels, Kramer & Co., et al.*, No. 83-2416, and *United States v. Arthur Andersen & Co.*, No. 83-2417. These appeals address issues concerning the

application of Section 7609 to the enforcement of Internal Revenue Service ("I.R.S." or the "Service") administrative summonses. As in the instant case, First Western's appeals raise the issue of the propriety of the I.R.S. serving a multi-target summons to one target without obtaining pre-service judicial approval to protect the interests of other, unidentified targets "with respect to whose liability the summons is issued." (26 U.S.C. § 7609(f)).[1]

First Western is a broker and dealer of United States government securities and forward contracts in United States government securities. Since 1980, the I.R.S. has been concurrently investigating the income tax liabilities of both First Western and its customers.

In 1982 the I.R.S. issued four summonses to First Western Government Securities, Inc. and Samuels, Kramer & Co. Two of the summonses, so-called "corporate" summonses, demanded production of all corporate records held by the two companies as well as their customers' records. The other two summonses, so-called "John Doe" summonses, sought production of the same customers' records, although the summonses were facially limited to those customers who purportedly were not known to the I.R.S. at the time. Pursuant to the government's petition for enforcement, the United States District Court for the Northern District of California enforced the summonses. The United States Court of Appeals for the Ninth Circuit reversed the order of the district court and remanded the case for a limited evidentiary hearing on the issue of whether the I.R.S. acted in bad faith in issuing the summonses. *United States v. Samuels, Kramer & Co., et al.*, 712 F.2d 1342 (9th Cir. 1983).

[1]Hereafter, unless otherwise noted, all statutory references are to the Internal Revenue Code of 1954, as amended, 26 U.S.C.

The I.R.S. also issued summonses in 1982 to Arthur Andersen & Co., which had prepared First Western's annual certified financial statements and its income tax returns. The summonses again sought production of the records of First Western as well as the records of First Western's customers. The I.R.S. provided notice of the summonses to First Western pursuant to subsection 7609(a), but failed to obtain pre-service judicial approval, in accordance with subsection 7609(f), for the summonses which related to First Western's unknown customers. The I.R.S. also failed to give notice under subsection 7609(a) to those customers who were, at the time of issuance of the Arthur Andersen summonses, known to the I.R.S.

Following the remanded hearing in *United States v. Samuels, Kramer & Co., supra*, the district court enforced the First Western summonses and also enforced the Arthur Andersen summonses. First Western appealed both enforcement orders and the Ninth Circuit entered stays pending the outcome of the appeals. As noted above, these appeals are presently pending.

In the summonses themselves, in the pleadings seeking enforcement and also during the course of the First Western summons enforcement proceedings, the I.R.S. and the Department of Justice admitted that, at the time the summonses were issued, the government intended to investigate concurrently the tax liabilities of both First Western and its customers and that the summonses were issued with respect to the tax liabilities of both. At no time has the government provided "notice" to the known customers of

First Western that their records are the subject of I.R.S. summonses. 26 U.S.C. § 7609(a)(1). Although the government obtained prior judicial approval for service of a John Doe summons with respect to the unknown customers whose records it sought from First Western, it failed to obtain pre-service judicial approval for the summonses with respect to those same unknown customers served on Arthur Andersen. 26 U.S.C. § 7609(f).

In the pending appeals, First Western contends that, pursuant to subsection 7609(a), the government must provide "notice" to those customers known to the government whose records are sought pursuant to the "corporate" and Arthur Andersen summonses. First Western further contends that with respect to the unknown First Western customers whose records are sought from Arthur Andersen, the government must obtain pre-service judicial approval pursuant to subsection 7609(f).

The issues presented to this Court in this case seek delineation of the rights under Section 7609 of known and unknown taxpayers who are the targets of I.R.S. investigations. First Western is a party to two appeals which will, in all likelihood, be directly affected by this Court's decision. Given its substantial interest in the outcome of this case, First Western respectfully requests consideration of the following arguments addressing the important issues raised by the case at bar.

SUMMARY OF ARGUMENT

The issue before this Court is whether the I.R.S. must comply with the pre-service requirements of subsection 7609(f) when it issues a summons for the purpose of

investigating concurrently the tax liabilities of the summoned party and the tax liabilities of unidentified taxpayers whose records are in the possession of the summoned party. First Western submits that Section 7609, when read as a whole and as illuminated by Congressional statements of concern for the civil rights of taxpayers under investigation, requires the I.R.S., pursuant to subsection 7609(f), to obtain judicial approval before it may serve the summonses issued in the case at bar.

This Court has consistently ruled that a deferential standard must be applied in construing the scope of the I.R.S. summons authority. *United States v. Powell*, 379 U.S. 48, 54 (1964). In *United States v. Euge*, 444 U.S. 707, 711 (1980), this Court stated, "if the summons authority claimed is necessary for the effective performance of congressionally imposed responsibilities to enforce the tax code, that authority should be upheld absent express statutory prohibition or substantial countervailing policies." *See also United States v. Bisceglia*, 420 U.S. 141, 150 (1975). Subsection 7609(f), however, when read as an integral part of the protections afforded under Section 7609, creates an express statutory prohibition against enforcement. Moreover, the statute and its legislative history identify substantial countervailing policies which require the application of subsection 7609(f) whenever, as in the case at bar, the I.R.S. seeks to investigate by administrative summons the tax liabilities of both the summoned party and ascertainable but unidentified taxpayers.

ARGUMENT

SUBSECTION 7609(f) APPLIES WHENEVER A SUMMONS SEEKS TO INVESTIGATE THE TAX LIABILITIES OF ASCERTAINABLE BUT UNIDENTIFIED TAXPAYERS, EVEN THOUGH THE SUMMONED PARTY IS ALSO ONE OF THE PERSONS WITH RESPECT TO WHOSE LIABILITY THE SUMMONS IS ISSUED

A. The Operation of Section 7609

While the I.R.S. has broad power under Section 7602 to summon a taxpayer or any other person to appear and produce any books, papers, records or other data which are relevant to investigate the correct tax liability of any person, the exercise of that power is subject to the provisions of Section 7609 in the case of a third-party summons. When the I.R.S. seeks to investigate the tax liability of a person by examination of records which are held by some other person, Congress has required the I.R.S. either to give notice to the affected taxpayer (subsection 7609(a)) or to obtain pre-service judicial approval (subsection 7609(f)).

The two operative subsections, subsections 7609(a) and 7609(f), are alternatively triggered by whether or not the summons identifies the taxpayer or taxpayers with respect to whose liability the summons is issued.[2] On the one hand,

[2]This Brief does not address the issue of whether the I.R.S. must give notice under subsection 7609(a) to those taxpayers whose identities it has learned from a recordkeeper's production under a John Doe summons.

if pursuant to subsection 7609(a)(5)[3] the summons identifies the taxpayer whose liability is being investigated, and the summons is served upon a "third-party recordkeeper",[4] subsection 7609(a) requires the I.R.S. to give notice to the person or persons identified. Such "noticees" are entitled to begin, or intervene in, a proceeding to challenge enforcement of the summons. 26 U.S.C. § 7609(b).[5]

On the other hand, if the summons does not identify the person or persons "with respect to whose liability the summons is issued," subsection 7609(f) requires that before a summons may be served, a court proceeding must be initiated by the government at which the Service must establish that: (1) the summons relates to the investigation of a particular person or ascertainable group of persons; (2) there is a reasonable basis for believing that such person or persons may have failed to comply with any internal revenue law; and (3) the information sought by the I.R.S. is not readily available from other sources.[6]

[3]Subsection 7609(a)(5) provides that, for any applicable summons, the summons must "identify the taxpayer to whom the summons relates or the other person to whom the records pertain."

[4]The term, "third-party recordkeeper," is defined in subsection 7609(a)(3).

[5]The summonses at bar were issued on October 6, 1981. At that time, subsection 7609(b) provided that the government had to petition the district court to obtain an order enforcing the summonses. A non-summoned taxpayer, seeking to prevent enforcement, was obligated to intervene. 26 U.S.C. § 7609(b). Since January 1, 1983, pursuant to the Tax Equity and Fiscal Responsibility Act of 1982, Pub.L. No. 97-248, §§ 351, 352, 96 Stat. 324, the burden is upon the recordkeeper or the non-summoned taxpayer to initiate an action to quash the summons. 26 U.S.C. § 7609(b).

[6]Subsection 7609(f) applies regardless of whether it is served on a statutorily-defined "third-party recordkeeper." *United States v. Mobil Corp.*, 543 F.Supp. 507, 516 (N.D. Tex. 1981).

B. Congress Enacted Subsection 7609(f) to Protect Unidentified but Targeted Taxpayers

Congress enacted Section 7609 in response to this Court's broad construction of the administrative summons authority of the I.R.S. in *United States v. Bisceglia,* 420 U.S. 141 (1975). In *Bisceglia,* the Court ruled that the I.R.S. was authorized under the broad language of Section 7601 and Section 7602 to issue a so-called "John Doe" summons to seek books and records of a transaction without naming the taxpayer involved. The Court concluded that the only protection afforded from arbitrary and capricious actions was the federal courts. *Id.* at 151. Troubled by the implications of *Bisceglia,* Congress enacted Section 7609 as a part of the Tax Reform Act of 1976, Pub.L. No. 94-455, § 1205, 90 Stat. 1520.[7]

By enacting Section 7609, Congress subjected the summons authority of the I.R.S. to certain procedural safeguards to protect the "right of privacy" of taxpayers under investigation. (House Report at 308.) While recognizing that administrative summonses constitute an "important investigative tool" for the I.R.S., Congress declared that such summonses "should not unreasonably infringe on the civil rights of taxpayers, including the right of privacy." (House Report at 308.) Section 7609 manifests a congressionally-struck balance between the Service's need for effective investigative tools and the taxpayers' fundamental rights of privacy.

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[7]H.R. Rep. No. 94-658, 94th Cong., 2nd Sess. 307 (1975), *reprinted in* 1976 U.S. Code Cong. & Ad. News 2897, 3203 (hereafter "House Report"); Senate Rep. No. 94-938, 94th Cong., 2nd Sess. 368 (1979), *reprinted in* 1976 U.S. Code Cong. & Ad. News 3439, 3796 (hereafter "Senate Report").

In structuring that balance, Section 7609 constitutes "unambiguous directions from Congress" to subject the summons authority of the I.R.S. to certain procedural safeguards. *United States v. Bisceglia, supra* at 150. Failure to satisfy the applicable requirements of Section 7609 compels denial of service or enforcement of the summons. *United States v. Powell,* 379 U.S. 48, 57-58 (1964) (one of the prerequisites to enforcement is that the administrative steps required by the Internal Revenue Code have been followed). Accordingly, the I.R.S. is not entitled to deferential consideration of its claimed summons authority; the issue here is the construction of an "express statutory prohibition"[8]: Are the procedural safeguards and prohibitions imposed by Congress in subsection 7609(f) rendered inapplicable whenever the Service identifies the summoned party as one of the multiple targets "with respect to whose liability the summons is issued"? The answer, compelled by the language of Section 7609 and its legislative history, is that subsection 7609(f) applies whenever there are ascertainable, but unidentified, targets, even if the summoned party is one of the targets.

Section 7609, when read as a whole, demonstrates that Congress sought to protect any targeted taxpayer, even when the recordkeeper is also a target of the I.R.S. investigation. There are numerous examples in Section 7609 and its legislative history where Congress anticipated the summoned party as a target yet mandated the application of the statute's safeguards. First, Congress expressly included within the category of "third-party recordkeepers" a well-known audit target of the I.R.S. Within the definition

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[8]*United States v. Euge,* 444 U.S. 707, 711 (1980).

of "third party recordkeeper", Congress included any "barter exchange (as defined in Section 6045(c)(3).)" 26 U.S.C. § 7609(a)(3)(G).[9] The inclusion of a "barter exchange" as a "third-party recordkeeper" was made when Congress was well aware that the I.R.S. was investigating concurrently the tax liabilities of both barter exchanges and barter exchange members.[10] The inclusion of barter exchanges, in light of the declared audit program of the I.R.S., demonstrates a congressional recognition that a "third-party recordkeeper" may be one of the targets of the investigation and yet Section 7609 still applies.

The construction of Section 7609 sought by the government, however, suggests that the statute's protections would be inapplicable whenever the Service chose to audit a barter exchange and its members. Indeed, the Service has fre-

[9]Congress amended subsection 7609(a)(3) to include "any barter exchange" by the Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. 97-248, enacted August 19, 1982, effective September 3, 1982 (. . . "the committee believes that barter exchanges ought to be granted status as third-party recordkeepers."). Senate Report No. 97-494, July 12, 1982, 97th Cong., 2nd Sess., at 283, *reprinted in* 1982 U.S. Code Cong. & Ad. News 781, 1028.

[10]On September 17, 1979, the I.R.S. established the Barter Exchange Project Unreported Income Program. *See* Department of Treasury, Manual Supplements No. 45G-324, 41G-133, 42G-405 and 9G-114. The manual states that the purpose of the project is to "identify and select returns in need of examinations that are associated with organized barter exchanges . . . [including] the return of barter exchanges, owners and operators and members of such exchanges." The manual further provides that if the operator of the exchange declined to furnish information concerning its members, a John Doe summons pursuant to Section 7609(f) should be issued after consultation with District Counsel. Man. Supp. No. 45G-324, §§ 7.01-.02(1) at 4.

quently audited both the barter exchange and its members. *See, e.g., United States v. Thompson,* 701 F.2d 1175, 1178 (6th Cir. 1983); *United States v. Gottlieb,* 712 F.2d 1363 (11th Cir. 1983). Given this pattern of concurrent investigations, as well as the Service's institutional directives (*see supra* at n.10), the government's proposed construction would render the congressional inclusion of "any barter exchange" a nullity. A construction of a statute that renders it meaningless must be rejected. *Boone v. Lightner,* 319 U.S. 561, 565 (1943).

Second, Section 7609 directly addresses the situation where the summoned party is a target of the summons. In subsection 7609(a)(4)(A), Congress excepted application of the notice requirements of subsection 7609(a) whenever the summons was "served on *the* person with respect to whose liability the summons was issued, or any officer or employer of such person" (emphasis supplied). Congress reasonably perceived that, when the summoned party was the only target, no substantial interest was served by requiring that notice be given to all persons who are described in the summoned records but who are not under investigation.[11] In addition, Congress appears to have been concerned with the situation where a corporate employee or officer is served with a summons, *i.e.,* the "in-house" cus-

[11]Contrast the Congressional concern when the summoned party was not a target:

> While the third-party witness [the summoned party] also has this right of challenge, even under present law, the interest of the third-party witness in protecting the privacy of the records in question is frequently less intense than of the person to whom the records pertain. (House Report at 308.)

todian of records. The exception clarifies that the target corporation itself is not entitled to a "second" notice.[12]

Third, the intent of Congress that Section 7609 apply, even when the summoned party is one of the audit targets, is again illustrated by one of the factual examples used by Congress to explain the application of subsection 7609(f). The Committee Reports explain that a "John Doe" summons was appropriate where the Service sought "to obtain the names of corporate shareholders involved in a taxable reorganization which had been characterized by the corporation (in a letter to its shareholders) as a nontaxable transaction." (House Report at 312.) Under this example, in all likelihood, the corporation would also be under investigation of its tax liability in addition to the corporate shareholders.[13] The example illustrates that subsection 7609(f) will apply notwithstanding the identification of the summoned party as one of the persons with respect to whose liability the summons is issued.

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[12]The exception under subsection 7609(a)(4)(A) does not apply to a summons which falls within the requirements of subsection 7609(f).

[13]If the transaction fails to qualify for non-recognition treatment under the reorganization provisions of the Internal Revenue Code, it will be treated under the Code provision dealing with sales, liquidations, redemptions or dividends, depending upon which type of transaction it most resembles. 26 U.S.C. §§ 1001 (sales), 336-337 (liquidating distributions), or 302 (redemption distributions); *see also* B. Bittker & J. Eustice, *Federal Income Taxation of Corporations and Shareholders*, ¶ 14.57 at 14-192 (1979). Under any one of these categories, such treatment could cause the corporation to be taxed on a purported sale of corporate assets or, pursuant to Section 311(d) of the Internal Revenue Code, for the use of appreciated assets to redeem the corporation's own stock.

It is significant to note that Congress, by unambiguous and direct language, provided that Section 7609 would not limit the summons authority of the I.R.S. where the summoned party was the *only* target "with respect to whose liability the summons is issued." As explained above, pursuant to subsection 7609(a)(4)(A), the notice requirements of subsection 7609(a) do not apply when the summoned party is the only target. Similarly, subsection 7609(f) does not apply when the summoned party is the only target, inasmuch as the summoned party is identified and is the only party with respect to whose tax liability the summons is issued. As clearly as Congress rendered Section 7609 inapplicable when the summoned party was the only target, the legislative history demonstrates that Congress clearly intended Section 7609 to apply when the summoned party was but one of multiple targets of the I.R.S. investigation.

The legislative history of Section 7609 reveals that Congress was primarily concerned with providing protection to those persons who would not otherwise know of the service of the summons, or those unidentified taxpayers who could not receive notice but whose rights of privacy could be abused. Congress provided a simple procedural remedy:

> The committee believes that many of the problems in this area would be cured if the parties to whom the records pertain were advised of the service of a third-party summons, and were afforded a reasonable and speedy means to challenge the summons where appropriate . . . .
>
> In the case of a John Doe summons, advance notice to the taxpayer is obviously not possible. Here the committee decided that the IRS agent should be required to show adequate grounds for serving the summons in

an independent review process before a court before any such summons can be served. (House Report at 380.)

Crucial to the issue at bar is the recognition by Congress that *all* taxpayers, with respect to whose liability the summons is issued, are entitled to the procedural safeguards of Section 7609. Congress recognized that one taxpayer could not adequately represent, nor assert the personal defenses of, all other taxpayers, particularly such personal defense as "attorney-client privilege" or "Fifth Amendment rights." (House Report at 310.) Accordingly, Congress required that all taxpayers are to receive the protections of Section 7609:

> Where more than one person is identified in the description of the records as a person the records of whose transactions are to be inspected, then *all such persons* are to have the right to receive notice under these provisions, and are also to have the right to challenge the summons . . . (House Report at 309 (emphasis supplied).)

Congress' concern for "all" taxpayers expressly included "John Doe" taxpayers. Congress recognized that such unidentified taxpayers were particularly entitled to protection. (House Report at 308.) Congress was concerned that the administrative provisions of the I.R.S. authorizing John Doe summonses did "not fully provide all the safeguards which might be desirable in terms of protecting the right of privacy." (House Report at 308.) Indeed, Congress emphasized that it did not "intend that the John Doe summons be available for purposes of enabling the Service to engage in a possible 'fishing expedition'." (House Report at 312.) Congress was especially sensitive to the potential

for abuse of John Doe summonses, and required the Service to "convince the court that it has made a good faith, reasonable effort to explore other methods of investigation, and that use of the John Doe summons is the only practical means of obtaining information needed by the Service." (House Report at 312-313.) These compelling congressional concerns for the rights of unidentified yet targeted taxpayers would be betrayed if the provisions of subsection 7609(f) dissolve whenever the Service chooses to name the summoned party as one of the targets of the investigation.

The mere fact that the summoned party is one of the targets does not satisfy the factual predicate which Congress required to entitle the I.R.S. to serve a summons to investigate the tax liability of unidentified taxpayers. 26 U.S.C. § 7609(f). In such a situation, there is no assurance that the unidentified taxpayers constitute an "ascertainable group or class of persons", or that "there is a reasonable basis for believing that such group or class of persons" may have violated the Code, or that the information sought "is not readily available from other sources." 26 U.S.C. § 7609 (f) (1), (2) and (3). To deny application here, simply because the summoned party is one of the targets, will deny and thwart the Congressional purpose of protecting the unidentified taxpayers under investigation.

Section 7609, by its express provisions and its legislative history, demonstrates that Congress intended, even when the summoned party is a target, that the safeguards of subsection 7609(f) apply to protect the civil rights of the unidentified taxpayers.

C. Congress Rejected the Government's Claim of Administrative Burden

Congress was sensitive to the administrative burden that Section 7609 might impose on the I.R.S. (House Report at 310, 312). Congress devised expeditious proceedings and modest factual showings but still required, without significant exceptions, either notice or pre-service judicial approval when the I.R.S. issued an administrative summons to investigate non-summoned taxpayers. This delicate balance between modest substantive requirements for the I.R.S. and procedural safeguards for the taxpayers is evident throughout Section 7609.

Subsection 7609(b) provides for expedited consideration of a challenge to the enforcement of the summons. In addition, the statute of limitations for assessment of a taxpayer's liability is suspended during any period of court action for any taxpayer who challenges the summons. 26 U.S.C. § 7609(e). With respect to a John Doe summons, subsection 7609(h) provides *ex parte* consideration of the I.R.S.'s application for service. Moreover, the factual requirements to justify service of a John Doe summons are modest.[14] *United States v. Thompson*, 701 F.2d 1175, 1180 (6th Cir. 1983). These provisions reveal that Congress structured subsection 7609(f) to require the Service to seek prior judicial approval for a John Doe summons,

[14]Congress explained that ". . . the committee does not intend to impose an undue burden on the Service in connection with obtaining a court authorization to serve this type of summons. For example, the Service is not required to show that there is 'probable cause' . . . It is enough for the Service to reveal to the court evidence that a transaction has occurred, or may have occurred, and that the transaction . . . is of such a nature as to be reasonably suggestive of the possibility that the correct tax liability . . . may not have been reported . . ." (House Report at 312.)

but expedited and minimized the factual showing necessary to justify service of the summons. In essence, for both subsections 7609(a) and 7609(f), Congress afforded opportunities for protection of the taxpayers but without expanding the substantive rights of the taxpayers. (House Report at 310.) Accordingly, the administrative "burdens" of notice and pre-service judicial approval are the direct "burdens" which Congress imposed to protect the rights of the non-summoned taxpayers.

The government speculates that, if subsection 7609(f) applies when the summoned party is one of the targets, then "anyone who receives a summons under Section 7602 could demand that the I.R.S. satisfy the more rigorous requirements of Section 7609(f), subjecting the Service to far greater administrative and enforcement burdens than Congress can possibly have intended." Brief of United States in Opposition to Petition for Certiorari ("Govt. Brief in Opp. to Cert.") at 7.[15] The government, however, conveniently ignores the determinative question of the application of Section 7609: Who is the person or persons with respect to whose liability the summons is issued? *See* 26 U.S.C. § 7609(a)(5); *United States v. Thompson, supra* at 1179. If the summons is issued to investigate solely the tax liability of the summoned party, Section

[15]The government's speculation is not only unfounded, as demonstrated in the text, but also distorted. The requirements of subsection 7609(f) are far from "rigorous". *United States v. Thompson, supra* at 1180; *see also, supra* at n.14. Moreover, the application of subsection 7609(f) cannot subject "the Service to far greater . . . enforcement burdens . . . ." The requirements of subsection 7609(f) cannot be challenged at the "enforcement hearing". *United States v. Samuels, Kramer & Co.*, 712 F.2d 1342, 1346 (9th Cir. 1983).

7609 does not apply. 26 U.S.C. §§ 7609(a)(4)(A), 7609(f).[16] However, if there are other targets of the summons, in addition to the summoned party, such other taxpayers are entitled to the protections of Section 7609. Prior to the enactment of Section 7609, the government, through the Department of Justice, the Treasury Department and the Administrative Office of the United States Courts, argued strenuously to the Senate Finance Committee that notice and pre-service judicial review would seriously delay the administration of the tax laws through the actions of recalcitrant taxpayers. 122 *Cong. Rec.* 23384-23389 (daily ed. July 22, 1976). After hearing these arguments, Congress enacted Section 7609 and thereby rejected the government's claims. *Cf. Commissioner v. Bolder,* 369 U.S. 499 (1962). Here again, the "burden" which the Service seeks to avoid is the "burden" expressly imposed by "unambiguous directions from Congress." *United States v. Bisceglia, supra* at 150.[17]

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[16]The government fears that if it cannot satisfy the modest showing required under subsection 7609(f), the summons cannot be served and the I.R.S. will be prevented from investigating the tax liabilities of the summoned party. However, in that situation, if the Service desires to investigate the summoned party, it can simply request the district court to narrow the scope of the summons to provide that the records summoned can be used only for the investigation and audit of the summoned party. *United States v. Bisceglia, supra* at 151.

[17]The government also argues that "dual purpose" summonses are valid under Section 7602, citing *United States v. LaSalle National Bank,* 437 U.S. 298 (1978). Hence, according to the government, a "dual purpose" summons to audit both the summoned party and other unidentified taxpayers does not trigger the operation of subsection 7609(f). Govt. Brief in Opp. to Cert. at 6. This argument is illogical and semantically misleading.

Generally, the Service has been permitted to enforce a summons which, although issued with respect to the liability of only one taxpayer, serves a secondary purpose, such as assembling research data for a "Taxpayer Compliance Measurement Program." *United States v. First National Bank of Dallas,* 635 F.2d 391 (5th Cir. 1981); *see also United States v. Flagg,* 634 F.2d 1087 (8th Cir. 1980), *cert. denied,* 451 U.S. 909 (1981). But these cases are not instructive to the issue at bar. The Eighth Circuit in *United States v. Barter Systems, Inc., supra,* at 167 n.10, came to the same conclusion, ". . . *LaSalle National Bank* . . . and . . . *First National Bank of Dallas* . . . are not directly on point." The cases cited by the government implicate only the rights of the summoned party. Subsection 7609(f) does not apply when the only person with respect to whose liability the summons is issued is the summoned party. Similarly, the notice requirements under 26 U.S.C. § 7609(a) do not apply when the summoned party is the only person with respect to whose liability the summons is issued. 26 U.S.C. § 7609(a)(4)(A). The instant case implicates the rights of not only the summoned party but also numerous ascertainable but unidentified taxpayers. The issue at bar is not "dual purpose" summonses, but rather multi-party summonses, particularly multi-target summonses.

The government's plea of administrative burden seeks in reality the total emasculation of Section 7609. Under the government's "burden-free" construction, by simply manufacturing a *prima facie* legitimacy to an investigation of the summoned party, the I.R.S. would be entitled to avoid Section 7609 entirely. Such a construction impermissibly offers the I.R.S. "an irresistible invitation" to circumvent the safeguards mandated by Congress in Section 7609. *United States v. Thompson, supra* at 1179 n.8.

D. Conflicting Decisions in the Courts of Appeals

The issue at bar has been addressed in three similar cases: *United States v. Gottlieb,* 712 F.2d 1363 (11th Cir. 1983); *United States v. Thompson,* 701 F.2d 1175 (6th Cir. 1983); *United States v. Barter Systems, Inc.,* 694 F.2d 163 (8th Cir. 1982). In *Barter Systems,* the Eighth Circuit held that, notwithstanding a finding that one of the purposes of

the summons was to aid in the investigation of unidentified members of the barter exchange, subsection 7609(f) did not apply to the summons issued there, since the summons did identify the person with respect to whose tax liability the summons was issued, namely the barter exchange, and therefore was not a John Doe summons. *United States v. Barter Systems, Inc., supra* at 168.

In *United States v. Gottlieb,* 712 F.2d 1363 (11th Cir. 1983), the Eleventh Circuit recognized the existence of an institutional purpose to investigate the tax liabilities of both the recordkeeper and unidentified taxpayers whose records were in the recordkeeper's possession. *United States v. Gottlieb, supra* at 1367. The Eleventh Circuit held that subsection 7609(f) did not apply in the absence of an express statutory prohibition against enforcement and where neither the statute nor the legislative history identified any substantial countervailing policies which required denial of enforcement of the summons. *United States v. Gottlieb, supra* at 1368. Neither the Eighth Circuit in *Barter Systems* nor the Eleventh Circuit in *Gottlieb* were able to cite any explicit expression of congressional intent on the issue. *United States v. Barter Systems, supra* at 168-169; *United States v. Gottlieb, supra* at 1367. The underlying analyses in *Barter Systems* and *Gottlieb* are defective in the failure to recognize subsection 7609(f) as a congressionally-expressed procedural limitation on the summons authority of the I.R.S. Further, both decisions fail to acknowledge the purpose of subsection 7609(f), in light of the unambiguous direction from Congress, to afford protections to the unidentified taxpayers under investigation.

In *United States v. Thompson,* 701 F.2d 1175 (6th Cir. 1983), the Sixth Circuit found that, at the time of the issuance of the summons, the institutional posture of the I.R.S. as well as the personal intent of the agents was to target the members of the barter exchange as well as the barter exchange operator. *United States v. Thompson, supra* at 1178. The Sixth Circuit held that, under this circumstance, the literal language of subsection 7609(f) triggers the operation of the John Doe summons procedures. The court held that it was immaterial that the primary purpose may have been to audit the barter exchange. *Id.* The Sixth Circuit carefully observed that its decision "only applies where it is shown that there exists a clear intent to investigate unknown third parties at the time the summons is issued." *United States v. Thompson, supra* at 1180.

E. The Error Below

In the instant case, the Court of Appeals erred in applying the wrong legal standard to determine whether subsection 7609(f) was applicable. The correct legal standard, consistent with the holding in *United States v. Thompson, supra,* is whether the I.R.S. seeks, at the time of issuance of the summons, to use the records summoned to identify or investigate the tax liability of any unidentified person, persons or ascertainable class of unidentified persons other than the summoned party. If the I.R.S. is investigating only the tax liability of the summoned party, Section 7609 does not apply. Such a single-target summons is not rendered unenforceable because of the possibility that the I.R.S. may obtain some incidental benefit from the summoned records in a prospective investigation of some other taxpayer.

Section 7609 should apply, however, if the Service intends, at the time of issuance, to use the summoned records to investigate any person other than the summoned party.[18] The summons must identify all of the taxpayers to whom it relates or that ascertainable class of persons with respect to whose liability it is issued. The burden is on the summoned party to establish that the I.R.S. has failed to identify or describe all of the persons with respect to whose tax liability the summons is issued.[19] *United States v. LaSalle National Bank*, 437 U.S. 298, 316 (1978). In some cases, that burden is easily satisfied when the I.R.S. is conducting an institutionally-declared audit program, such as the Barter Exchange Program Unreported Income Project[20] or the Abusive Tax Shelter Program.[21] In such programs, the I.R.S. admits that its intent is to audit both the promoter/owner and the investor/member. *See, e.g., United States v. Gottlieb, supra; United States v. Thompson, supra; United States v. Samuels, Kramer & Co., supra.* Federal courts are well-experienced in determining the purpose or intended use of I.R.S. summonses. *See, e.g., United States v. LaSalle National Bank, supra; United States v. Bisceglia, supra; United States v. Powell, supra.*

[18]The standard is whether or not the agent or the Service institutionally had, as a motivating factor, the investigation of the unidentified taxpayers at the time of the issuance of the summons. *United States v. Thompson, supra* at 1181. The issue is not, as explained in *Thompson*, whether the Service had a primary or secondary intent to investigate the unidentified taxpayers. As the Sixth Circuit recognized, it is preferable to avoid an inquiry into the subjective intent of the agent or agency as to whether any one particular purpose was a primary or secondary consideration. *United States v. Thompson, supra* at 1181.

[19]The summoned party may also establish that the summons was issued for the purpose of obtaining the third-party records and that the audit of the summoned party itself was a mere pretext or subterfuge. *United States v. Gottlieb, supra* at 1369.

[20]*See supra* at n. 10.

[21]Internal Revenue Manual-Audit, 42(17)-3, "Management of the Tax Shelter Cases" ("The facts and documentation that are developed during examination of the promoter/syndicator are used in proposing adjustments to the investors' returns.").

CONCLUSION

Section 7609 does not limit the power of the I.R.S. to investigate the summoned party when that party is the sole target of the Service's investigation. Neither subsection 7609(a) nor subsection 7609(f) applies when there are no other targets but the summoned party. When the I.R.S. seeks to utilize an administrative summons to investigate a non-summoned taxpayer, Section 7609 applies. The I.R.S. imposes upon itself the application of Section 7609 by its use of a summons which gives notice to only one of several targets. Section 7609 will deny enforcement of a summons when the I.R.S. seeks to use the products of that summons against a taxpayer who, without the application of Section 7609, would be denied protection of its congressionally-recognized rights of privacy.

For the above-stated reasons, the judgment of the court below should be reversed.

Respectfully submitted,

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